DATE: November 10, 1999

CASE NO: 1999-INA-155

In the Matter of

TAOHEED HASAN
Employer

on behalf of

NAILA MUJAHID QURESHI
Alien

Appearances: Garish Sarin, Esq.
For Employer and Alien

Certifying Officer: Rebecca Marsh Day, Region IX

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Taoheed Hasan's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not

adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On September 1, 1995, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the California Employment Development Department ("EDD") on behalf of the Alien, Naila Mujahid Qureshi. (AF 41-42). The job opportunity was listed as "Cook Domestic". (AF 41). The job duties were described as follows:

> Plans menus with the family. Prepare and cook meals according to habits and taste of employer who is from Pakistan. Requiring experience and knowledge with Indian/Pakistani food. Especially curries, kabo[b]s, breads using halal meats and traditional spices and preparation. Serve meals. Must not smoke on job.

(Id.). The stated job requirements for the position, as set forth on the application, are two years experience in the job offered. (Id.).

The CO issued a Notice of Findings ("NOF") on July 22, 1998, proposing to deny certification. (AF 35-39). First, the CO found that the duties described by employer did not appear to constitute full-time employment in the context of employer's household and questioned whether the job was truly open to U.S. workers, citing 20 C.F.R. 656.3 and 656.20(c)(8). (AF 36-37). The CO instructed the Employer to provide evidence to establish that the position as performed in the Employer's household clearly constitutes full-time employment and that the job has not merely been created for the alien. (AF 37-38). Second, citing 20 C.F.R. 656.20(c)(1)

and 656.20(c)(4), the CO found that the Employer must document the ability to hire a full-time cook at the wage offered of $26,000.00 per year. (AF 38).

The Employer submitted his rebuttal to the NOF on August 25, 1998, in the form of a letter written and signed by Employer and the Employer's W-2 wage and tax statements. (AF 26-34). The rebuttal statement listed the duties of the cook and specific recipes, along with the number of meals the cook would prepare on a weekly basis. Employer asserted that currently his wife has to prepare dinner for their children which is kept frozen and warmed in the microwave and that he would like his children to eat nutritional food at home that is freshly made and not frozen. Employer explained that on an average week, 12 meals are prepared for him, and 14 meals are prepared for his children. Also, Employer stated that presently he has his social gatherings catered and it would take an average of another 10 hours a week for the domestic cook to prepare these meals for at least 20-25 persons. (AF 27-31).

The CO issued a Final Determination ("FD") on October 8, 1998, denying certification. (AF 23-25). The CO found that Employer failed to document that the job constituted a full-time employment opportunity, as defined in 20 C.F.R. § 656.3, or that the employment opportunity was available to qualified U.S. workers, in violation of 20 C.F.R. § 656.20(c)(8). (AF 24-25). In addition, the CO found that Employer failed to establish the ability to pay the prevailing wage for the position of domestic cook. (AF 25). The CO noted that Employer submitted W-2 forms but failed to furnish information to substantiate the ability to pay the domestic cook because it is unclear how many individuals the Employer is supporting. Furthermore, the CO found that Employer failed to address the issues raised in the NOF regarding: "the employer's history of having hired other domestic employees; the length of time required to prepare the meals; a description in detail of the frequency of household entertainment in the twelve (12) calender month period immediately preceding the filing of the application; a list of dates of entertainment; the number of guests entertained, the number of meals served...[and] who will perform general household maintenance duties and who has performed these duties in the past two years...." (Id.). For these reasons, the CO stated that she could not find that the Employer has a bona fide full-time domestic cook job to offer to the alien. (Id.).

The Employer filed a Request for Review on November 3, 1998. (AF 1-22). The file was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA") for review.

Discussion

In *Carlos Uy, III, 1997-INA-304* (Mar. 3, 1999) (*en banc*), the Board held that a CO may properly invoke the *bona fide* job opportunity analysis authorized by 20 C.F.R. 656.20(c)(8) if the CO suspects that the application misrepresents the position offered as skilled rather than unskilled labor in order to avoid the numerical limitation on visas for unskilled labor. When the CO invokes section 656.20(c)(8), however, administrative due process mandates that he or she specify precisely why the application does not appear to state a bona fide job opportunity. It is the employer's burden following the issuance of an NOF to perfect a record that is sufficient to establish that a certification be granted. The Board in *Uy* rejected the employer's contention that where a CO does not request a specific type of document, an undocumented assertion must be accepted and certification granted.

This matter falls squarely within our holding in *Uy*. Therefore, we hold as stated in *Uy* that:

> In view of the lack of clarity in the NOF, the inadequacy of the Final Determination, and today's clarification of the "totality of the circumstances" test when the CO raises the issue of *bona fide* job opportunity in an application involving a Domestic Cook, we remand this matter for issuance of a supplemental NOF. This NOF will provide Employer an opportunity to submit evidence of any kind to bolster his contention that he has a bona fide job opportunity for a Domestic Cook. The CO shall than consider the existing record and any supplemental documentation submitted by Employer and issue a Final Determination. If the CO determines that labor certification should be denied, she must explain her rationale for that determination.

Slip. op. at 16-17.

Accordingly, this matter will be remanded for the issuance of supplemental NOF for reevaluation of the application consistent with the *en banc* decision in *Uy*. *See also Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*) and *Elain Bunzel*, 1997-INA-481 (Mar. 3, 1999) (*en banc*).

Order

The Certifying Officer's denial of labor certification is hereby VACATED and the matter REMANDED for further development of the case.

For the Panel:

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DONALD B. JARVIS

Administrative Law Judge

San Francisco, California